SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-290

RANDALL LAWRENCE KILTY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit affirming the judgment of the United States District Court for the Central District of California, convicting the petitioner for a violation of the Universal Military Training and Service Act and sentencing him.

1. OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals is not yet reported. It is set forth as Appendix A to this petition.

2. STATUTORY PROVISION SUSTAINING JURISDICTION

The judgment of the Court of Appeals was entered on July 22, 1971, and the denial of Petition for Rehearing was entered on July 22, 1971, Appendix B to this petition.

This Petition for a Writ of Certiorari is filed within the required thirty days time.

The jurisdiction of the Court rests on Section 1254 (1) of the Judicial Code, 28 U.S.C. The District Court had jurisdiction under U.S.C. § 3231.

3. QUESTIONS PRESENTED AND HOW RAISED

The Motions for Judgment of Acquittal and the briefing in the Court of Appeals raised the following questions including the one of late crystallization of conscientious objections, considered by this Court in *Ehlert* v. *United States*, 91 S.Ct. 1319 (1971).

A. This petitioner questions the validity of the explicitly stated *factual* basis given by this Court for *Ehlert*. Petitioner presents herein a detailed affidavit of fact and over two dozen court opinions to show that the Court's stated basis had no basis in fact, *when* the decision was made.

Let it be emphasized that this petition contains a *new* allegation of fact one that arose at the army base of Fort Ord, Fort Ord, California by a final finding dated July 24, 1971 that *demonstrates* the incorrectness of the "assurance" given the Court by the General Counsel of the Army.

B. Whether *Mulloy* v. *United States*, 398 U.S. 410 (1970), requires a reopening of a registrant's classification postured as petitioner's.

Also, whether the recognition by the Department of Defense that its DoD 1300.6 should be amended to bring military practice to a state of consistency with this Court's prophylactic and prophetic *Ehlert* decision, supra, of April 21, 1971, gives protection to men, like this petitioner, who when they were administratively processed did not have a forum available.

4. STATUTES AND REGULATIONS INVOLVED

Involved are the Fifth Amendment and 32 C.F.R. § 1625.2. They are set forth in Appendix C.

5. STATEMENT OF THE CASE

The indictment charged Kilty with a violation of the Universal Military Training and Service Act for refusing to submit to induction [CT 1].

Kilty pleaded "not guilty" and was tried by the Honorable Charles Carr, District Judge, sitting alone without a jury. He was found guilty and given a two year sentence [CT 17], and is on bail pending appeal.

A written Motion for Judgment of Acquittal had been filed during the trial [CT 13].

6. THE FACTS

The facts are found in the Selective Service file of Kilty.[1]

On October 15, 1970, he was ordered to report for induction on October 27, 1970 [Ex. 10].

1. This file, Government's Exhibit 1, is pencil paginated at the bottom of each sheet and is hereafter referred to by sheet number.

On October 26, 1970, Kilty requested Selective Service System Form 150 for Conscientious Objectors, from his Local Board [Ex. 10, 74]. This letter [Ex. 74] stated he had "crystallized" his conscientious objections in "the last several days; that he had never met the board and desired to have such a meeting."

The form was given him and he filed it the same day. No meeting invitation was sent him [Ex. 54]. He subsequently refused to submit to induction [Ex. 103-104].

7. REASONS FOR GRANTING WRIT

The Court should consider anew its *Ehlert* decision because *it now appears* that the explicit reason for the Court's conclusion was without suficient *factual* basis.

8. ARGUMENT

POINT ONE

Ehlert Should Be Reviewed. Ehlert Explicitly Turned on a Factual Assumption That Demonstrably Is Without Basis-in-Fact

This Court said in *Ehlert*:

> "We are assured, however, by a letter included in the briefs in this case from the General Counsel of the Army to the Department of Justice, that present practice allows presentation of such claims and that there thus exists no possibility that late crystallizers will find themselves without a forum in which to press their claims. *Our conclusion in this case is based upon that assurance.*" 91 S.Ct. 1319, 1324-1325. (Italics supplied)

A. Recent research shows that there is no factual basis for rejecting the "no-man's land" argument; that, while the army will give a soldier in the no-man's land

posture the opportunity to *file* an AR 635-20 application it will not give him a meaningful, if any, consideration for discharge.

B. There is overwhelming judicial pronouncement of "facts", in context, that shows this "assurance" did not comport with reality at that time, among other things that late crystallizers discovered that the military would not lend its ears to them and that they truly were without a forum.

C. Additionally, counsel attaches to this petition his affidavit that relates his own recent experience in this area of military conduct. It shows that the above and other most serious aberrations were frequently present, so frequently that counsel has no hesitancy in presenting this affidavit against the hearsay "assurance" based on nameless, faceless informants. It, and a supplement are set forth in Appendix C to this petition.

A

The Most Recent Information That Has Come to Notice of Counsel Is the Experience of Pfc. Martin A. Rust, No. 588-88-6961 at Fort Ord, Fort Ord, California. Rust, a Pima Indian, Had His Application for Discharge, Based on His Conscientious Objections to War, Denied on July 24, 1971.

One of the two reasons given was that "applicant's professed views became fixed prior to his entry into the active military service." A true and correct copy of this decision is set forth in Appendix D.

Noteworthy is that the 03 Hearing in this instance more than met the requirement that the 03 officer be "knowledgeable" [AR 635-20, ¶4, (b)(3)] in that it was conducted by legally trained officers, three in fact [the only military installation where counsel has encountered a panel] all Judge Advocate General (JAG) officers.

B

There Is Overwhelming Judicial Opinion That the Factual Basis for This Court's Decision Was Unfounded and That the Language of Both the DoD 1300.6 and the AR 635-20 Was Uniformly Considered Plain, and That There Was No Ambiguity, and Must Be Followed by the Military.

All judicial experience supports this claim of petitioner. If the Court intends to overrule all the courts below on this point as it has already done in one area of *Ehlert* [with respect to those judges who support the uncontrollableness of conscience in relation to the "crystallization" doctrine] it is respectfully suggested that an explicit pronouncement would be in order, as in *Estep* v. *United States,* 327 U.S. 114 where the concurring opinion of Mr. Justice Frankfurter cataloged such an explicit repudiation of all Court of Appeals judges, but one (f. 1, pp. 138-139).

We present, in this portion of our petition, the determinations of over two dozen courts that support our thesis. They contradict the "assurance" passed on to this Court by the General Counsel of the Army.

What governs procedures in the army? The ARs, the army regulations. How much weight should the Court give a letter from the General Counsel, based on reports to him, augmenting the record?

On a battlefield a recognized means of communication, in small units is "Pass the Word." If the General Counsel adds "I'm Passing the Word" then a little more weight is to be given his good offices. In army officer groups a well recognized means of communicating is "Pass the Word."

But what has been, and what *is,* the practice of the army in our context? A little history is desirable for the light it throws.

In conscientious objector matters, *before* the 1968 amendment to DoD 1300.6, Pass the Word resulted in sabotage to the AR 635-20 as is to be seen from counsel's attached affidavit, ¶7. The sabotage is why the 1968 amendment was made by the Secretary of Defense.

Since the record may be augmented by hearsay (from sources deemed reliable) we invite attention to our affidavit, attached to this petition. In the context of the argument being now made we quoted the following portion of the affidavit:

The Central Committee for Conscientious Objectors is an organization largely operated by Quakers, and one that has had the respect of all concerned: Pentagon, Selective Service System, historic peace churches, etc. It has had a vast quantity of experience in these conscientious objector matters for a generation. In its publication "Handbook, for Conscientious Objectors", Eighth Edition, Third Printing, December, 1966, re DoD 1300.6, we read:

> "Although many men were discharged on grounds of conscience during 1964 and 1965, since the spring of 1966 virtually all applications have been denied regardless of merit." [82]

In its Ninth Edition, Second Printing, January, 1968 it saw no reason to alter the above statement and repeated it verbatim.

In its Eleventh Edition, September, 1970 it reported "About 70% of the applications for noncombatant status and about 20% of the applications for CO discharge are approved. Some unsuccessful applicants are discharged on other grounds." [93]

Evidently, the 1968 Amendment to the DoD improved the situation. What brought about the amendment and what were its new provisions?

1. Whereas, in 1964 and 1965 "many" of applicants for an AR 635-20 discharge were successful, Pass the Word reduced it to denials of "virtually all applications" in 1966 and 1967.

See counsel's affidavit of how this was done.

2. This sabotage, and the attendant outcry and pressure on the Pentagon brought the 1968 DoD 1300.6 amendment. *Thereafter* (1) the applicant's commanding officer was not to be his hearing officer; (2) a knowledgeable officer, 03 (captain) or higher was to be the hearing officer and (3) the applicant could have private counsel at the 03 Hearing. These changes clearly meant that the Department of Defense wanted the applicant to have a fair hearing.

The following, recent court opinions emphasize our claim that the standards for discharge are governed by the plain and clear mandate of DoD 1300.6 and AR 635-20 *and also show* that for some reason, despite the amended DoD 1300.6, a considerable proportion of the military 03 hearings are still conducted (1) by officers *in the chain of command* [forbidden], (2) officers *not* knowledgeable [forbidden]; (3) and that the courts *uniformly* have used the plain standard of the DoD and the AR namely, that the conscientious objections must not have become "fixed" before the enlistment or induction ceremony.

[These cases are in alphabetical order; all italics are supplied]

Bachman v. *Bradley,* No. 2673 (W.D. Mo. Jan. 5, 1971), 3 SSLR 3948

"And further, he states:

> '*In the past months* of my active duty service, *I have recognized* that the realities of Army life and functions *are irrevocably in conflict* with my convictions and beliefs.'" [3948]

Baker v. *Laird,* 316 F.Supp. 1, N.D. Calif. (1970)

> ". . . *the army could deny* an application for discharge to one claiming to be a conscientious objector where his application reveals that the grounds and beliefs adduced in support thereof *are identical with those shown to have pre-existed* induction. . . ." [4]

United States ex rel. Barr v. *Resor,* No. 23815 (D.C. Cir. March 31, 1971) 3 SSLR 3999:8

> "*Barr never submitted a claim* for exemption from all military service to *his Selective Board. The Army Board's determination* that Barr's application was governed by paragraph 3b (2) of *AR 635-20 was* therefore without basis in fact and habeas corpus was properly granted." [3999:10]

Bates v. *Commander, etc.,* 413 F.2d 475 (1969) 1 Cir.

> "The Commandant's initial findings implicitly attack the petitioner's sincerity. But by holding that petitioner's present claim is inconsistent with his prior voluntary enlistment, the Commandant puts him in a 'hanged if he does, hanged if he doesn't' predicament. *Under DoD Directive 1300.6 IV B2, conscientious objection will not be considered unless it arose after* induction or enlistment. By the Commandant's reasoning, therefore, petitioner's claim cannot be considered if it arose prior to his enlistment and is evidence of insincerity if it arose afterwards. By the force of this logic, no member of the armed services could ever qualify as a conscientious objector." [478]

Bohnert v. *Faulkner,* 6 Cir., 438 F.2d 747 (1971)

> ". . . the Department of Defense provides for in-service discharge for conscientious objectors and requires that *such beliefs must have been acquired after* the enlistee entered the service, the timing of the request for discharge supports no more than an inference insufficient alone to constitute a basis in fact for doubting sincerity." [754]

Bortree v. *Resor*, D. of Col. 1970, 316 F.Supp. 93

> "In accordance with Army Regulation No. 635-20, the petitioner was interviewed by . . . Captain H. J. Nitko[1], an officer in the Army *who is knowledgeable* in policies and procedures relating to conscientious objector matters; [f. 1-1. 'Originally Captain Thomas M. Duszynski had interviewed the petitioner, but he was disqualified by Headquarters, Department of the Army, since he was in the petitioner's *chain-of-command.*']"

Bortree v. *Resor*, No. 24607 (D.C. Cir. Mar. 2, 1971) 3 SSLR 3788

> "Moreover, all indications are that *these officers did not have legally sufficient grounds for their recommendations.* Captain Nadwodny was *Bortree's unit commanding officer* at Fort Dix and presumably had some contact with him, but he did not interview Bortree concerning his application for discharge." [3792]

United States ex rel. Brooks v. *Clifford*, 400 F.2d 700 (1969) 4th Cir.

> "Indeed, the administrative procedures were devised for the very purpose of permitting the assertion of a claim of conscientious objection . . . *when the objection was not formulated until after* military service had begun." [707]

Cohen v. *Laird*, No. 69-1085 (D. S.C. June 26, 1970) 3 SSLR 3875

> "Yet, it was *during this very period* of his basic training that he asserts *his convictions 'crystallized.'*" [3877]

Application of Corvell, 307 F.Supp. 209, N.D. Calif. (1969)

> ". . . *preclude granting discharges* to those . . . whose beliefs *pre-dated* but were not claimed prior to *active duty.*" [212]

Donham v. *Resor*, 2 Cir., 436 F.2d 751 (1971)

> [On the requirement that the *Hearing Officer be knowledgeable* only one opinion is known to counsel *where the decision turned on this*, the Court finding that the Hearing Officer (a Colonel Gleason, at West Point) was *not knowledgeable in context.*] [754]

Goodwin v. *Laird*, 317 F.Supp. 863, N.D. Calif. (1970)

> ". . . he has adequately explained how and why *his beliefs became fixed after* entry to the service." [866]

Gordon v. *Resor*, S.D.N.Y., 323 F.Supp. 268 (1970)

> "The armed forces naturally focus their attention on conscientious objection *crystallizing after induction*, leaving cases of earlier crystallization to the jurisdiction of the Selective Service System. Ehlert v. United States, 422 F.2d 332 (9th Cir. 1970); Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968); United States v. Gearey, 368 F.2d 144, 149-150 (2d Cir. 1966); cert. denied 389 U.S. 959, 88 S.Ct. 335, 19 L.Ed.2d 368 (1967); DoD 1300.6, supra." [270]

Grossman v. *Fallwell*, No. 21429 (D. Md. Nov. 28, 1969) 3 SSLR 3977

> "All three of the line officers then (Captain Smith, Captain Clark and Lieutenant Colonel Gettings) concurred in the following critical finding:
>
> 1. That petitioner was sincere,
>
> 2. That his convictions were motivated by religious beliefs, and
>
> 3. That *they became fixed after he went in the Army.*
>
> In the face of those conclusions reached by those Army officers who were closest to petitioner, and who had personal contact with him, it is indeed difficult to understand how the Review Board could make diametrically opposed findings." [3979]

United States ex rel. Healy v. *Beatty,* 424 F.2d 299, 5th Cir. (1970)

> ". . . the objection itself *must so manifest itself and not exist prior to entry on active duty.*" [302]

Helwick v. *Laird,* 5 Cir., 438 F.2d 959 (1971)

> "Rather, the requirement of AR 635-20 (3) (b) is that the objection itself—the objection to participation in war in any form—*must become fixed only after entry into the Army.*" [966]

Keil v. *Seaman,* D. Md., 314 F.Supp. 816 (1970)

> "Nor does this Court find any basis in fact for concluding that Keil's beliefs were not sincerely reached and held, *or that they did not become crystallized and fixed until after* his induction into the Army." [822]

Kepple v. *Laird,* 319 F.Supp. 1342, D. of C. (1970)

> After citing AR 635-20, ¶2b on page 1344 the court concluded:
>
> > "There is no showing that Kepple was under any compulsion to enlist in the Army and *no evidence* to overcome his claim that his convictions as to *conscientious objection had not matured at that time.*" [1345]

La Manna v. *Laird,* W.D. Tex., 322 F.Supp. 1289

> "The case of United States ex rel. Healy v. Beatty, supra, is in point. There it was argued that Healy's religious beliefs did not change and did not 'develop subsequent to entry into the active military service.' In fact, Pvt. Healy conceded this. However, this loses sight of the fact that 'the Regulations speak of the development of conscientious objection to the participation in war "in any form" *after induction*', that is to say, participation in such noncombatant service as the Medical Corps." [1292]

Lovallo v. *Resor*, No. 71C48 (E.D. N.Y. Feb. 4, 1971), 3 SSLR 3874

> "His experiences in the Army, according to his statements, served to increase his adversion [sic] to violence and warfare. The personal contacts he made and the exposure to new points of view in the 26th Army Band had a further significant impact on his thinking: '. . . [G]radually *my conscience assumed a new depth of commitment* to the beliefs that I had long before internalized.' AHBCA-BA at p. 6. He became active in the Staten Island Peace Coalition which along with the reported events at Mylai further deepened his commitment." [3874]

McMahan v. *Laird*, S.D. Cal., 320 F.Supp. 485 (1970)

> *After citing* DoD 1300.6 and Bupersnote 1900 dated August 24, 1970 the court concluded "Clearly, petitioner has more than satisfied his burden . . ." [489]

O'Connor v. *McKean*, No. 70-93 N.D. Ala. (May 5, 1970), 3 SSLR 3498

> "Army Regulations 635-20 2.b. (1) provides for consideration of applications for discharge when the conscientious objection develops subsequent to entry upon active military service, but *specifically excludes from consideration* requests based solely on conscientious objection *which existed, but not claimed, prior* to induction. This same philosophy expressed in the comparable Selective Service Regulations has been approved by the Courts. Keene v. United States, supra; Nellons v. United States, 1 SSLR 3144, 399 F.2d 295 (5th Cir. 1968). There is no reason the Army Regulation should not be given the same treatment." [3500]

Polsky v. *Wetherill*, 438 F.2d 132, 10th Cir. (1971)

> ". . . Polsky was in fact a sincere conscientious objector but that his beliefs in such regard *had not crystallized during military service* but were existent at the time of Polsky's voluntary enlistment." [133]

Rabbito v. *Larson*, No. 70-572, N.D. Calif. (Aug. 19, 1970), 3 SSLR 321

> ". . . *hearing officer denied* petitioner's claim because his application is based solely on conscientious objection *which existed but was not claimed prior* to his coming into military. . . . Petitioner's application in some detail describes how and why his beliefs became fixed after entry to the service." [3212]

United States ex rel. Sheldon v. *O'Malley*, 420 F.2d 1344, C.A. D.C. (1969)

> "The general policy is stated to be that *consideration will be given* to separation requests '*when* such conscientious objection *develops subsequent to entry* into the active military service.'" [1345]

United States v. *Sigmon*, CM 416356 (Board of Review, U.S. Army, Jan. 2, 1968), 1 SSLR 3054

> "The only factual questions . . . (1) Did the appellant actually attempt to apply for a discharge; and (2) Did his beliefs arise *subsequent* to his entry on active duty." [3055]

Stehling v. *Casey*, No. 70-C-104 (W.D. Wis. Jan. 22, 1971), 3 SSLR 3912

> "He stated that his view *had not begun to crystallize until* he had *been activated* as a National Guard member for riot duty on the University of Wisconsin campus. He stated that he was a Roman Catholic at the time of the application, that he had been raised a Catholic and had attended 'a seminary for three years,' but that 'the full impact of the [Christian] concept' of the brotherhood of man had 'never really dawned' on him until the guard duty during the campus disturbance. He referred to a sermon on brotherhood and to certain experiences during his attendance at a National Guard summer camp. He said that 'attending the seminary for three years deepened my religious be-

liefs,' but that his conscientious objection had not solidified until years later, shortly before the filing of his application." [3912]

Talford v. *Seaman*, 306 F.Supp. 941, D. Md. (1969)

". . . he did not realize the incompatability of his religious beliefs and war in any form, until after his entry into the service."

* * *

"There remains the *issue* of whether Talford's views *became fixed before entry* into the service." [945]

C

The "Assurance" Given the Court by the General Counsel of the Army Is to Be Reweighed, We Finally Argue in the Light of the Army's Repeated Conduct in Processing Conscientious Objectors for Honorable Separation During the Last Past Year. We Will Show That the Army Proceeds in Flagrant Violation of Many of the Mandatory Provisions.

In connection with pending petitions for writs of certiorari [Ronald Dale Taggert and the combined petition of Douglas James Farrell and Mark Albert Roy] an affidavit of present counsel was included and is here reproduced with notations of the present status of the applicants.

"STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

J. B. Tietz, being first duly sworn, states:

1. I am counsel of record in this captioned case and was counsel for petitioners in all courts below, trial and appellate.

2. I started practicing law in Ohio, in 1926; and, at all times since 1944 have practiced in my present office at 257 South Spring Street, Los Angeles, California.

3. Since 1944, and for 25 of the last 27 years I have specialized in draft and related military problems, nearly all of these clients claiming conscientious objections to war and to military training.

4. During this 25 year period I have followed the procedures of the eleven armed services (the four regular, and the seven reserve and guard organizations) as carefully as possible, on matters concerning my clients.

5. In 1968 DoD 1300.6[1] was amended in two chief particulars: (1) to take away the initial decision on a man's conscientious objections from his immediate commanding officer and (2) to afford him the opportunity to have private counsel: ". . . The applicant will then be afforded an opportunity to appear in person (with counsel retained by him, if he desires) before an officer in the grade of 03, or higher, who is knowledgeable in policies and procedures relating to conscientious objector matters. The designated hearing officer will not be an officer in the applicant's chain of command."

Prior to this amendment, and from the beginning of the Vietnam armed involvement reports came to me from many military installations that DoD 1300.6 was being entirely disregarded, as follows: "An officer took me aside and said 'I'm giving you a friendly tip: the policy here is to grant no c.o. discharges. You are up against a stone wall.' I learned he was telling me the truth."

From 1968 to date my aid to in-service men has included appearing with them at such hearings, ones now universally termed "the 03 hearing."

6. Samples of my experiences are:

a. Most recently, on April 20, 1971, I appeared with and on behalf of Dr. Ralph Hannah at the Armory in

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1. The Department of Defense Directive referred to in *Ehlert*.

Pasadena, California. The hearing officer was an infantry colonel[2] and the four other officers present were either infantry or other non-legal (Judge Advocate General) men, hereinafter referred to in this affidavit as JAG officers. Each was in uniform like the Hearing Officer.

The Hearing Officer was directly on the applicant's chain of command. He answered one of my questions, as follows: "No, this is the first such hearing I have attended."

I was forbidden to use my *tape recorder*[3] and was told, "No, you will not get a *copy of my report.*"[3]

b. On April 22, 1971, I was at Fort Ord, Fort Ord, California with and on behalf of PFC Martin Rush, a "Native American" that is an Indian from the historically peaceful Pima tribe.

There I encountered three[4] young JAG officers all sitting as a panel and was told *"No, you cannot use the tap recorder."*[3]

c. On December 2, 1970 I was at a lawyer's office in Pasadena, California with Lt. Max Bothwell.

The Hearing Officer was an infantry colonel; the man who had appointed him was a colonel in chemical warfare; both were in dress uniform, as was an infantry major. All were in applicant's organization and/or chain of command.

I was *forbidden to use my tape recorder* (it being explained "This would inhibit freedom of expression."); I was told "You *will not get a copy* of my report."

This was the most extraordinary one I have attended in that 95% of all the hearing officer said was in this

2. Underscoring denotes a violation of the DoD.
3. Italicizing denotes a grave unfairness.
4. Underscoring denotes a violation of the DoD.

vein: "You are a most intelligent young man; the army needs you; you can do much for the service if you stay in."

d. I have attended hearings (all since the 1968 amendment, of course) where situations comparable to the above were present such as one at Fort Lewis, Fort Lewis, Washington, where the hearing officer was an infantry major and forbade the use of a tape recorder, one at the Marine Aircraft Wing near Santa Ana, California where the Marine Corps major was a non-legal officer and in the chain of command but did permit recording.

e. Where the Hearing Officer is favorably impressed, and so declares in a detailed report (with corroborating support in the form of many unimpeachable letters) the applicant still can encounter an abrupt and arbitrary denial of relief by a superior officer, a man who never saw him. See cases cited in Point I, above.

Where relief is thereafter obtained at the trial level [by a persistent soldier and one able to get a lawyer's aid] such cases are generally unreported. For example Bernie Reynolds had a most favorable Hearing Officer report, and a dozen letters from priests and nuns but had to file a petition, in San Francisco, to get his writ of habeas corpus. No. 51576 N.D. Cal.

7. Concerning the sabotage of the initial version of DoD 1300.6. Several clients, from different military installations informed me, during the period beginning in 1966 up to the middle of 1968: An officer said to me I'll give you a tip. You are in a blind alley. The policy here is to turn down all these c.o. applicants.

8. The Central Committee for Conscientious Objectors is an organization largely of Quakers, and one that has had the respect of all concerned: Pentagon, Selective Service System, historic peace churches, etc. It has had a vast quantity of experience in these conscientious ob-

jector matters for a generation. In its publication "Handbook for Conscientious Objectors", Eighth Edition, Third Printing, December, 1966, on page 82 re DoD 1300.6:

> "Although many men were discharged on grounds of conscience during 1964 and 1965, since the spring of 1966 virtually all applications have been denied regardless of merit."

In its Ninth Edition, Second Printing, January, 1968 it saw no reason to alter the above statement and repeated it verbatim.

In its Eleventh Edition, September, 1970 it reported "About 70% of the applications for noncombatant status and about 20% of the application for CO discharge are approved. Some unsuccessful applicants are discharged on other grounds." On page 93.

Evidently, the 1968 Amendment to the DoD improved the situation. What brought about the amendment and what were its new provisions?

1. Whereas, in 1964 and 1965 "many" of applicants for an AR 635 20 discharge were successful Pass the Word reduced it to denials of "virtually all applications" in 1966 and 1967.

2. This sabotage, and the attendant outcry and pressure brought the 1968 DoD 1300.6 amendment. *Thereafter* (1) the applicant's commanding officer was not to be his hearing officer; (2) a knowledgeable officer, 03 (captain) or higher was to be the hearing officer and (3) the applicant could have private counsel at the 03 Hearing. These changes clearly meant that the Department of Defense wanted the applicant to have a fair hearing.

/s/ J. B. Tietz
J. B. Tietz
Attorney for Petitioners

Sworn to before me and subscribed in my presence this 18th day of May, 1971.

/s/ William A. Leeds
Notary Public in and for the County of Los Angeles, State of California

(Seal)

SUPPLEMENTAL AFFIDAVIT.

This supplemental affidavit is to further show that the current practice of the military is to proceed without legal advice and, in consequence, to ignore the many court decisions interpreting the DoD 1300.6 and its progeny, in this instance the controlling Marine Corps Order, termed M.C.O. 1306.16B.

On May 22, 1971 affiant represented Pfc Elmer Ray Kent at his 03 Hearing at the Marine Air Base, Yuma, Arizona.

The Hearing Officer was a non-legal man (an aviator); also, he was in the chain of command. The "non-legal but aviator fact" was established by the insignia I observed on his lapels and by the way he signed documents that are now part of Kent's conscientious objector application for separation; the "chain of command" fact was his statement to me during the hearing.

The Hearing Officer also stated to me he would "use the chaplain's report and recommendation and the psychiatrist's report and reasoning."

[This is not permissible: In the case of U.S. ex rel. Greenwood v. Resor (4th Cir., No. 15,392, April 12, 1971), the Court pointed out that AR 135-25 para. 7b, expressly directs that neither the chaplain nor the psychiatrist should make a recommendation for approval or disapproval of an application for CO dis-

charge. Thus the Court could "give no weight to the recommendation of either officer and we disregard whatever weight they were given by the Review Board."]

Also, he stated he would use, as his standard for judgment, Selective Service Systems Dr. Tarr's standard of "training with rigor." This standard is false; there is no justification in the Act or in *Welsh* for this. It was issued, by the Director [LBM 107 6/July '70 Tarr] right after he was upset by the *Welsh* decision of the Court, June 15, 1970.

We were originally told that this hearing would be at the El Toro Marine Corps Base, a large installation with a legal department. No explanation was given for the change, or why a legal officer wasn't present.

On May 27, 1971 I received a telephone call from Kent and he read me the rejection recommendation of the 03 Hearing Officer: it was based on the incongruity of a man claiming conscientious objection to war when the record showed he had been convicted of possessing marihuana. It incorrectly stated he had been selling it, incorrect in other respects and most important, this and all other items were not mentioned at the 03 Hearing and we didn't know they were being considered. Copy of the Hearing Officer's report is attached. Copy of Kent's letter to affiant is also attached. Attention is invited to Kent's statement that the Hearing Officer interviewed him *before* the Hearing, in absence of counsel, and in defiance of the regulation and fairness. We refer to ¶5 of Kent's letter to affiant:

"(5) He brings up many things which were not even covered in the hearing which came from conversations we had had before. The whole copy seems to revolve around this rather than the actual hearing."

An affidavit from Kent will be procured, one rebutting the report, if and when further pleadings are in order.

On May 29, 1971 the text of the report and recommendation of disapproval came. It was based on "insincerity". If supported by "demeanor" or by recited, pertinent facts the report would be on solid ground.

There is no mention of demeanor by word or in inference and the facts were immaterial ones such as (1) a conviction on a marihuana charge [partly incorrect]; (2) paper work late, including his letters of reference and, most important *none* of these items were related to us at the hearing and when I questioned the Hearing Officer at the conclusion of it whether he believed the applicant had been frank the officer said "Yes".

I had started the proceeding with his permission, and on my statement "We have the burden and, with the Hearing Officer's approval I will proceed with our case", and, after I covered everything, the officer asked almost no questions.

At the close he said, "You have covered everything" and then went into some generalities.

/s/ J. B. Tietz
J. B. Tietz

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

Sworn to before me and subscribed in my presence by J. B. TIETZ, personally known to me, on May 31, 1971.

/s/ Edward Raiden
Notary Public in and for the
County of Los Angeles,
State of California.

(Seal)

COPY TO KENT

1:Ti:hr
1330
25 May 71

SECOND ENDORSEMENT on Private Elmer R. KENT's ltr 1:JBM:jcp over 1330 dtd 19 May 71

From: Captain James B. MCKENNEY (SSN 425 78 69 65) MSN 09 54 43/1501, USMC

To: Commanding Officer, Marine Training Squadron

Subj: Conscientious Objector Status; request for

1. Returned.

2. It is recommended that Private KENT's application be disapproved.

3. On 23 May 1971, Marine Corps Air Station, Yuma, Arizona, a hearing was conducted with Private Elmer R. KENT and Mr. J. B. Tietz (Attorney at law) present. Private Kent was afforded the opportunity to support his application.

4. It is felt that Private KENT's application is insincere. His application comes at a time when he is awaiting trial by Special Court Martial for an eleven month unauthorized absence. He was arrested 1 October 1970 by civilian authorities for possession of marijuana, selling marijuana, and possession of dangerous drugs. He was tried and convicted on 23 December 1970, served a ninety day sentence and is on three years' probation. He stated that he had planned to return and apply for a conscientious objector status but was arrested. Although he claims to have started on the paper work prior to arrest, all his letters of reference are dated after 20 November 1970. It is felt that while in civilian custody, he decided to apply for this status as a means of evading court martial.

5. Private KENT professes to believe that everyone is God and all people should love each other. His belief was derived from a vision that he witnessed over a year ago on a rainy morning in El Toro. Also he stated that he can no longer perform any job in the military.

6. The Chaplain and Psychiatrist also believe that KENT's application is insincere and a means of getting out of military service.

7. It is further recommended that the Convening Authority proceed with the trial of Private KENT.

J. B. MCKENNEY

27 May 1971

Mr. Tietz,

Here's the copy. I want to go to court with this. I'm confident that I'll be able to pay you your fee. I'm already working on that now.

There are some things which bother me about this copy.

(1) He states that he feels my application is insincere. He said at the hearing that he felt I was sincere.

(2) He brings up my civil case stating that I was arrested for Pocess. Maraj., Sales of Maraj. and pocess dangerous drugs. There was no sales involved—that was an intent to sell charge—besides it was dropped and so was the pocess dangerous drugs. I feel he's slighting me here and building ground for prejudice against me.

(3) A remark about my claiming to have started my application prior to arrest. I have my receipts and things which you gave me at the time I first came to visit you.

(4) I was not tried and convicted on that civil charge. I was black mailed and coerced into a plea of guilty.

(5) He brings up many things which were not even covered in the hearing which came from conversations we had had before. The whole copy seems to revolve around this rather than the actual hearing.

(6) "His belief was derived from a vision that he witnessed over a year ago on a rainy morning in El Toro." I did not derive my belief from that. That was only a conformation or understanding. Sort of like the key that opened the door. Also I don't believe I said rainy morning because it was at night and I don't think it was raining. I believe I stated that it occurred about the same time of year as when Calif. had that storm which caused rain for 13 days straight.

That's about all I can think of right now. When you reply can you give me some idea of the length of time—(like a tentative time table) for this proceeding. That will give me a frame work to work with in on financing this. I believe I can collect the money soon.

Thank You

/s/ Elmer R. Kent

P.S. They were supposed to have my hearing at El Toro. There was supposed to be a Colonel as the 0-3 and some other people were going to sit in. I learned this from Capt. Suciu my military defense counsel. He doesn't know why it was cancled. Perhaps a mistake was made. I'll check."

Final information: Kent was offered a less than honorable discharge and took it; Dr. Hannah's application was rejected, the only statement given was "does not meet

criteria" and is now starting district court liquidation; Bothwell writes he was rejected but has no further knowledge of his plans.

Final Comment: The letter of the General Counsel of the Army says only that the army has allowed ". . . a soldier to file for discharge in instances where his conscientious objector views are fixed after a notice of induction but prior to entry into the military service."

Permission to "file" is one thing; "consideration" is another. The General Counsel is right that a claim may be filed; he is wrong if he meant to imply a meaningful consideration would be given by the army.

CONCLUSION

For the above reasons certiorari should be granted.

Respectfully submitted,

J. B. TIETZ
257 South Spring Street
Los Angeles, California 90012
Phone: (213) 625-1693
Attorney for Petitioner

August 24, 1971